

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO CALDERON,

Defendant and Appellant.

E048393

(Super.Ct.No. FSB703317)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed with directions.

Libby A. Ryan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ricardo Calderon guilty of assault (Pen. Code, § 240),¹ a lesser included offense of assault with a deadly weapon (§ 245, subd. (a)(1)), as charged in count 1; and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), as charged in count 2. The jury also found true that defendant had personally inflicted great bodily injury upon the victim. (§ 12022.7, subd. (a).) Defendant, thereafter, admitted he had suffered a prior prison term. (§ 667.5, subd. (b).) As a result, defendant was sentenced to a total term of eight years in state prison: the upper term of four years on count 2; a consecutive term of three years for the great bodily injury enhancement; and one year for the prior prison term enhancement. Defendant was also sentenced to a concurrent term of 180 days for the simple assault conviction, with credit for time served.

Defendant's sole contention on appeal is that his sentence for assault should have been stayed pursuant to section 654. The People concede. We agree and will order defendant's sentence modified. In all other respects, we affirm the judgment.

I

FACTUAL BACKGROUND

On May 22, 2007, the victim was visiting his friend at the friend's home in San Bernardino. Defendant arrived at the house and the three men casually conversed. The victim, a gay male, was waiting for defendant because he asked his friend to "set [him] up with [defendant]."

¹ All future statutory references are to the Penal Code unless otherwise stated.

At some point, defendant told the victim that he was going to leave to pick up some beer and come back. When defendant walked outside to leave, the victim followed him and asked defendant what time he was coming back. Defendant asked, “[W]hy?” The victim offered defendant oral sex when he returned. Defendant responded, “[N]o, dude, I don’t fuck around like that.” The victim said, “[O]kay, I’m sorry.” Defendant walked away.

The victim went back inside the house. The victim’s friend, also a gay male, asked the victim what happened. The victim replied, “[defendant] got mad because maybe I was too fast.”

Sometime later, defendant returned to the house; the victim was outside. Defendant angrily walked toward the victim and pulled out a knife from his back pocket. Defendant then yelled, “[Y]ou mother fucker fuckin’ faggot,” and tried slashing the victim with the knife. The victim ran backwards to escape the attack. Defendant eventually punched the victim in the mouth, and the victim fell to the ground. Defendant then began kicking and punching the victim, while still trying to stab him with the knife.

The victim screamed for his friend to come outside and help him. When the friend came outside, defendant left. As a result of the attack, the victim suffered a broken jaw and a lost tooth.

II

DISCUSSION

Defendant contends that his concurrent 180-day sentence for the simple assault conviction should have been stayed pursuant to section 654 because the conviction arose out of the same incident as the assault by means likely to produce great bodily injury.

Under section 654, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The statute thus prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer, supra*, 5 Cal.4th at p. 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives, which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.)

The People concede that the simple assault and assault by means likely to produce great bodily injury convictions arose from the same set of operative facts and that

defendant harbored a single intent when he assaulted the victim. Accordingly, they concede that the trial court should have stayed the sentence on the simple assault under section 654. We agree and order the sentence modified.

III

DISPOSITION

The sentence imposed on the simple assault is stayed pursuant to section 654. The superior court clerk is directed to amend the abstract of judgment and the minute order of the sentencing hearing to reflect the stay of the sentence imposed on the simple assault. The superior court clerk is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.